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No. 84-583

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

HOSEA LORENZO WILLIAMS,
Petitioner,

v.

WAYNE MELTON, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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STATEMENT OF THE CASE

I. Proceedings in the Courts Below

Petitioner was indicted by the July 1980 term of the DeKalb County, Georgia Grand Jury in two counts. Count I charged the felony offense of Operating a Motor Vehicle After Revocation of Motor Vehicle License As An Habitual Violator. Count II charged the misdemeanor offense of Leaving the Scene of An Accident Without Rendering Aid as required by Ga. Code Ann. §68-1620 (now O.C.G.A. §40-6-271). On April 24, 1981 following his jury trial, Petitioner was convicted on both counts and sentenced to five years (one year to serve followed by four years on probation) on the felony conviction and twelve months concurrent to serve on the misdemeanor.

Following the denial of Petitioner's

Motion for New Trial, the case was appealed to the Georgia Court of Appeals. On May 24, 1982, said Court affirmed the misdemeanor conviction and reversed the accompanying felony conviction. Williams v. State, 162 Ga. App. 415 (1982). Petitioner began serving the twelve month sentence on June 25, 1982.

In August of 1982, Petitioner filed a federal habeas corpus action in the United States District Court for the Northern District of Georgia. That action was dismissed for failure to exhaust state remedies. Thereafter, Petitioner filed a state habeas corpus petition raising, for the first time, his claim of denial of his Sixth Amendment right of confrontation of witnesses. The state habeas court denied the writ in an opinion filed August 9, 1982. Petitioner's

application for a certificate of probable cause to appeal that denial to the Georgia Supreme Court was denied.

A second petition for writ of habeas corpus was filed in the United States District Court for the Northern District of Georgia in November of 1982 and the Court released Petitioner on bond pending the resolution of that action. Petitioner had served approximately four and one-half months of his twelve month misdemeanor sentence at the time of his release on bond.

Although United States Magistrate Robert J. Castellani submitted a report and recommendation that the petition for writ of habeas corpus be denied in March of 1983, United States District Court Judge Marvin Shoob granted the petition for writ of habeas corpus. Williams v.

Melton, 568 F. Supp. 104 (N.D.Ga. 1983). Respondent Melton appealed the decision of the District Court to the Eleventh Circuit Court of Appeals which reversed the grant of habeas relief. Williams v. Melton, 733 F.2d 1492 (11th Cir. 1984).

II. STATEMENT OF FACTS

The evidence at trial disclosed that there was a collision between two automobiles at an intersection in DeKalb County, Georgia on July 18, 1980. Cyrus Broadus testified that he was driving his Oldsmobile toward Candler Road when another car coming toward him turned left in front of him. The collision was nearly headon. Mr. Broadus, who was dazed after his head hit the windshield of his car, remembered someone came to the car, looked in, turned around and

left. He couldn't recall whether that person was male or female, black or white. After some bystanders helped Broadus over to the side of the road, his car rolled several hundred yards down the hill and into a ditch. The other car, a Buick, came to rest against a pole at the intersection but the driver of that vehicle was nowhere to be found.

Among the people who gathered after the accident, three residents of the neighborhood testified at trial. Each related a separate but similar incident wherein an unidentified man on the scene shortly after the collision remarked to the witnesses or within their hearing that the driver of the Buick looked like Hosea Williams. Robert Steve remembered the man saying that the Buick's driver, who looked like Hosea Williams and wore a

flowered shirt, went up to the car, looked in and headed off down the street. The other two, Mrs. Harkness and Mr. Epperson, heard the man say Hosea Williams was the driver. This testimony was admitted under the res gestae rule of Georgia Code Ann. §38-305 (now O.C.G.A. §24-3-3).

The first law enforcement officers arrived on the scene about 8:20 p.m., just a few minutes after the accident. They searched the Buick and found various documents addressed to and from Hosea Williams and a Hertz rental agreement in Mrs. Williams' name. That, coupled with the information received from the witnesses, prompted them to put a lookout over the radio in that area for a black male wearing a flowered shirt, possibly Hosea Williams. Williams is a well-known

and generally recognizable public figure in the Atlanta area.

Within thirty minutes after the accident, Hosea Williams was arrested at the back side of the Bingo Palace, his business located on Candler Road one-half to one mile from the accident scene. Williams was wearing a flowered shirt and was somewhat disheveled with a cut over his right eye. Later, at the police station, a briefcase containing some $1,400.00 in receipts from the Bingo Palace was removed from the car trunk and claimed by Mr. Williams. A plastic bag of tomatoes was also found in the car.

A customer at the Bingo Palace testified that she gave a plastic bag of tomatoes to Mr. Williams that night and that he took it and his briefcase and went out the front door of the Bingo

Palace just before 8:00 p.m.

A traffic accident specialist testified that damage done to the rear-view mirror inside the Buick was consistent with William's wound and the probable pattern of impact on the driver of the Buick.

The position of the defense was that an unknown person other than Williams had been driving the Buick when the wreck occurred. The general manager of the Bingo Palace claimed that she put the tomatoes and money in the car and couldn't remember what she did with the keys. She and Williams' sons said he was at the Bingo Palace from 8:00 to 9:00 that night. They also described his cut as a scratch. However, the nurse at the jail said it would have required five stitches to close. Barbara Golden testi-

fied that she took the photographs which were introduced to show there was no serious wound to Williams' face. On cross-examination, she admitted falsifying the date on the receipt the day before she testified. She later pled guilty to perjury.

Williams testified that he worked at the Bingo Palace that night in a back storage room where he cut his head on the jagged edge of a door. He said he had left the business to go to a nearby store for a band-aid when he was arrested He characterized the trial as a political persecution.

SUMMARY OF ARGUMENT

The United States Supreme Court has held that when a hearsay declarant is not present for cross-examination at trial,

the Confrontation Clause normally requires a showing that he is unavailable. Even then, the statement must have adequate "indicia of reliability" before it can be admitted into evidence. Reliability can be inferred without more if the evidence falls within a firmly rooted hearsay exception. In other cases, it must be shown that the evidence has particularized guarantees of trustworthiness. Ohio v. Roberts, 448 U.S. 56, 66, 100 S. Ct. 2531, 2539, 65 L.Ed.2d 597 (1980).

Petitioner has conceded that the hearsay declarant in the instant case was both unidentified and unavailable. The reliability of the hearsay evidence admitted at trial can be inferred because it conforms to a firmly rooted exception

which is applied routinely in the federal courts, i.e. excited utterances.

Even if this Court finds that the challenged hearsay statements are not inferentially reliable, the statements can be considered to have particularized guarantees of trustworthiness because they meet the criteria established in Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). Therefore, the admission of the statements into evidence did not violate Petitioner's right of confrontation.

Furthermore, only the Ninth Circuit Court of Appeals departs, in any material way, from the accepted application of the rule in Ohio v. Roberts and Dutton v. Evans, supra, and that departure is irrelevant to Petitioner's treatment by the Eleventh Circuit.

ARGUMENT AND CITATION OF AUTHORITIES

I. The Admission At Trial of Hearsay Testimony Under The Georgia Res Gestae Exception To The Hearsay Rule Did Not Violate Petitioner's Sixth Amendment Right Of Confrontation.

The Sixth Amendment to the United States Constitution provides that

> in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.

This "confrontation clause", in a literal construction, would ensure that all witnesses against the accused must testify under oath at trial where they are subject to cross-examination and where the jury can observe their demeanor. However, this interpretation has been "rejected as unintended and too extreme". Ohio v. Roberts, 448 U.S. 56, 59, 100 S.Ct. 2531, 2535, 65 L.Ed. 2d 597 (1980). Where it is not possible to sum-

mon witnesses for a personal appearance at trial and where an unavailable witness has made an extrajudicial statement which is inculpatory as to the accused, there have long been established alternate means of presenting this evidence to the jury. Most commonly utilized is a series of recognized exceptions to the hearsay rule which dispense with the need to have the unavailable declarant testify at trial as a condition precedent to the admission of the statement.

While this Court has never identified the confrontation clause and the hearsay rule as congruent, it has held that they "stem from the same roots" and pursue the same purposes. Dutton v. Evans, 400 U.S. 74, 86, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). Exceptions to the hearsay rule which have frequently sup-

ported admission of out-of-court statements held not to violate the accused's right of confrontation including dying declarations, Mattox v. United States, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892), Kirby v. United States, 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890 (1899), Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 293 (1965); prior recorded testimony of an unavailable witness, Marcusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972); a declaration by a co-conspirator in furtherance of the conspiracy, United States v. Kelley, 526 F.2d 615 (8th Cir. 1975), cert. den. 424 U.S. 971, 96 S.Ct. 1471, 47 L.Ed.2d 739 (1976), United States v. Perez, 658 F.2d 654 (9th Cir. 1981); recorded past recollections, United States v. Kelly, 349 F.2d 720

770 (2d Cir. 1965), cert. den. 384 U.S. 947, 86 S.Ct. 1467, 16 L.Ed.2d 544 (1966); and spontaneous utterances, McLaughlin v. Vinzant, 522 F.2d 448, (1st Cir. 1975), cert. den. 423 U.S. 1037, 96 S.Ct. 573, 46 L.Ed.2d 412 (1975).

A. Firmly rooted exceptions to the hearsay rule.

The most recent pronouncement from this Court on the subject fashioned an analysis or "general approach" giving specific deference to "firmly rooted hearsay exceptions."

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more is a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing

> of particularized guarantees of trustworthiness. (Emphasis added), Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980).

The Court thusly has acknowledged that the traditionally established exceptions to the hearsay rule "rest upon such solid foundations" as to satisfy the necessary indicia of reliability without more and "that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.' Mattox v. United States, 156 U.S. 237, 244, 15 S.Ct. 337, 340, 39 L.Ed. 409 (1895)." Ohio v. Roberts, supra, at 2539. Such a rule was held to serve the concerns and principles which have evolved recently in cases such as California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213

(1970), and Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972).

The Eleventh Circuit Court of Appeals found Georgia's res gestae exception to the hearsay rule to be such a firmly rooted exception. Williams v. Melton, 733 F.2d 1492, 1495 (11th Cir. 1984). It has been established and practiced in Georgia for 120 years and carries with it, as predicate requirements, those elements which seek to insure the trustworthiness of statements thusly made. The declaration to be offered must accompany the act or

> be so nearly connected therewith as to be free from all suspicion of device or afterthought. O.C.G.A. §24-3-3 (formerly Ga. Code Ann. §38-305).

Spontaneity and voluntariness are the key factors, believed to negate the probabil-

ity of deliberate or conscious misrepresentation.

The Georgia law's continued use of the phrase "res gestae" may be archaic but the principles underlying the Georgia courts' application of the exception are well-accepted in other forms and under other labels.

Although not the express basis for the Eleventh Circuit decision, Respondent would note to this Court that the Georgia statute provides the same protections insuring the same reliability which have been provided for in Federal Rules of Evidence 803(1) and 803(2). Rule 803(1) sanctions admission of "present sense impressions," statements describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately there-

after. Rule 803(2) approves the use of "excited utterances," statements relating to a startling event or condition made while the declarant was under the stress of the excitement caused by the event or condition. The exceptions themselves are considered to possess such guarantees of trustworthiness that non-production of the declarant in person at trial is justified even though he may be available. See Notes of Advisory Committee on Proposed Rules, Rule 803, 28 U.S.C.A. p. 584 (West 1975).

Federal courts which have examined the application of these statutory exceptions, both federal and state, in the context of the confrontation question have agreed with the framers of the rules that the parameters of each rule provide the necessary safeguards of reliability

and trustworthiness of the testimony so as to justify an exception to face-to-face confrontation at trial. See McLaughlin v. Vinzant, 522 F.2d 448 (1st Cir. 1975), cert. den. 423 U.S. 1037, 96 S.Ct. 573, 46 L.Ed.2d 412 (1975), (an oral declaration, made by the non-testifying co-defendant within minutes after the shooting, that "George shot someone" was admitted under the Massachusetts spontaneous utterance exception to the hearsay rule); United States v. Nick, 604 F.2d 1199 (9th Cir. 1979)(a declaration, made by a three-year old child to his mother after she had taken him home from the babysitter, that the babysitter had sexually molested him was admitted under Federal Rules of Evidence, Rule 803(2)); and Haggins v. Warden, Fort Pillow State Farm, 715 F.2d. 1050 (6th Cir. 1983)(a

four-year old child's declarations, admitted as res gestae, were analyzed by the Court of Appeals as excited utterances).

There can be little doubt that the accident involved in the instant case constitutes a startling event. The collision was nearly headon, and with such force that the victim, Cyrus Broadus, had to be helped out of his car by several bystanders. After Mr. Broadus reached the side of the road, his car rolled several hundred yards down the hill and into a ditch.

Federal courts have found that far more mundane occurrences constitute exciting or startling events. United States v. Boyd, 620 F.2d 129 (6th Cir. 1980), (arrival of police while suspect runs between apartments with stolen mail);

United States v. Napier, 518 F.2d 316 (9th Cir. 1975), (kidnapping victim shown a photograph of her assailant eight weeks after the crime). It should be noted that McCormick specifically cites automobile accidents as the type of event likely to produce the requisite level of excitement. McCormick, Evidence, §297, 705 (2d Edition, 1972).

The determination of whether the exclamation was made sufficiently contemporaneous with the startling event is one which "depends entirely on the circumstances of each case." 6 Wigmore, Evidence, §1750, 144 (3d Edition, 1940). In Petitioner's case, Mr. Steve testified that approximately ten to fifteen minutes after the accident, an unidentified black man standing in the crowd that had gathhered, stated to him that "the guy that

was driving that car...looked just like Hosea Williams", that the man who looked like Hosea Williams looked at the injured driver of the other car and then "went down the street," and that "[h]e had on a flowered shirt".

An examination of federal case law reveals that statements made within ten to fifteen minutes of a startling event are near enough in time to be considered spontaneous. United States v. Golden, 671 F.2d 369 (10th Cir. 1982). The federal courts have gone so far as to hold that a lapse of one hour does not remove evidence from the excited utterance exception. United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980). While the declarants in those cases were victims, it is well-settled that "nervous excitement which renders an utterance

admissible may exist equally for a bystander as well as for the injured or injuring person, and therefore the utterances of either, concerning what they observed, are equally admissible." 6 Wigmore, Evidence, §1755, 159-160 (3rd Edition, 1940). See McCormick, Evidence, §297, 705 (2d Edition, 1972). Participation by the declarant is not required; a non-participant may be moved to describe what he perceives, and one may be startled by an event in which he is not an actor. See Federal Rules of Evidence for United States Courts and Magistrates Advisory Committee's Notes, Rule 803, p. 107 (West 1975).

Respondent contends that the severity of the near headon collision, the attendant confusion created by removing the injured driver from his car, and the

the injured driver from his car, and the subsequent crash of the car into a ditch several hundred yards away were enough to sustain a sense of excitement in the by-stander-declarant for a period of ten to fifteen minutes.

The exclamation in the instant case obviously related to the circumstances of the event which produced it. The utterance dealt with the identity of one of the participants in the automobile accident. It is also significant to note that the declarant did not merely state that the driver of the Buick looked like Hosea Williams. He added that the driver "had on a flowered shirt". Williams was arrested less than thirty minutes after the accident, one-half to one mile away. He was wearing a flowered shirt. The fact that the description given by the

declarant contained a relatively specific description of the driver's clothing, which proved to be accurate, adds appreciably to the reliability of the statement.

The challenged hearsay statements in the instant case satisfy the requirement of the Georgia res gestae statute and, by analogy, Rules 803(1) and 803(2) of the Federal Rules of Evidence. Since all are firmly rooted hearsay exceptions, Ohio v. Roberts implies that the reliability of the statements should be inferred without any further showing of trustworthiness. Respondent submits that the hearsay evidence in the instant case should not be rejected as unreliable by this or any other court merely because it was admitted at trial pursuant to a state statute which contains a phrase no longer utilized in federal courts.

B. Indicia of reliability.

Despite the Eleventh Circuit's finding that the Georgia res gestae exception was firmly rooted, the court conscientiously went on to analyze Petitioner's claim by examining what indicia of reliability were present in the challenged testimony. Williams v. Melton, 733 F.2d 1492, 1495 (11th Cir. 1984). Petitioner complains that the court did not set out its reasoning specifically according to the four-pronged test applied to Dutton v. Evans and separate its conclusions as to (1) whether the content of the statement warned against giving it undue weight, and as to the (2) knowledge and perception, (3) memory and (4) motivation of the unknown declarant.

Nothing in Dutton mandates strict adherence to that form or requires that

all four of those factors be satisfied unanimously and to an equal degree of strength in every case. See U.S. v. Fleishman, 684 F.2d 1329, 1339 (9th) cert. den. 459 U.S. 1044, 103 S.Ct. 464, 74 L.Ed.2d 614 (1982). Indeed, the Eleventh Circuit approach considers the same issues and achieves the same end as would have been achieved by a formal application of the Dutton language. Its' recitation of the facts acknowleges that that unknown declarant's statement is an express assertion of facts (that the driver was Hosea Williams and wore a flowered shirt). Williams, 733 F.2d at 1494. However, the "substantial circumstantial evidence" which was present to corroborate those assertions provided this jury with a standard of measurement with which to test the assertions and

their trustworthiness. Id at 1496.

Second, the declarant's personal knowledge of the identity of the driver of the abandoned car can be deduced from his particularized description. The declarant did not merely give a general physical description of a nameless individual. He told Mr. Steve that the man looked like a particular person, Hosea Williams, who is well-known in the area, and wore a particular type of clothing, a flowered shirt. Since the details of the description were later found to be accurate, it is reasonable for the Eleventh Circuit and the jury to conclude that the declarant's personal knowledge was very reliable.

Third, the simplicity and accuracy of the declarant's statement, coupled with the brief time interval between the

accident and the time the statement was made, remove any possibility that the statement was founded on faulty recollection.

Fourth, the fact that the hearsay statements are amply supported by circumstantial evidence is a clear indication that the declarant did not misrepresent Williams' involvement in the accident. Between twenty and thirty minutes after the accident, Williams was found one-half to one mile from the scene. He was wearing a flowered shirt. Williams was disheveled with a cut over his right eye. The rearview mirror inside the Buick had been broken off. A traffic specialist testified that after examining the physical evidence of the accident, he concluded that Williams' wound and the broken mirror were consistent with the

probable impact of the driver of the Buick.

A briefcase containing $1,400 in receipts from Williams' place of business was removed from the car trunk. The briefcase was claimed by Mr. Williams at the police station. Also found in the car were various documents addressed to Williams as well as a rental agreement in his wife's name. A customer at the Bingo Palace testified that she gave Williams a plastic bag of tomatoes on the night of the accident. She said Williams took it and went out the front door of the establishment just before 8:00 p.m. A plastic bag of tomatoes was found in Williams' car.

The Eleventh Circuit closely examined this ample amount of circumstantial evidence indicating that Williams was the

driver of the abandoned Buick and responsibly held that the hearsay admitted against Petitioner at trial was corroborated sufficiently to ensure reliability and trustworthiness, which have always been the central concern of this Court.

II. The Eleventh Circuit Decision Is In Accord With Controlling Opinions From This Court And No Significant Split Exists Among The Circuits As To How To Apply Dutton v. Evans and Ohio v. Roberts.

As has been discussed above in this argument, Respondent asserts that the Eleventh Circuit decision is consistent with both the letter and the spirit of Supreme Court decisions concerning rights guaranteed to a defendant by the Confrontation Clause of the Sixth Amendment. Petitioner has challenged not only that

relationship but also alleges that the other circuits "are in disarray" concerning the admissibility of hearsay.

A close examination of the cases cited by Respondent to support the latter allegation reveals that, at most, only the Ninth Circuit may have diverged from the common application of the Ohio v. Roberts principle:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. 448 U.S. at 66, 100 S.Ct. at 2539.

The Ninth Circuit appears to be alone among the circuits in its holding that "if the hearsay does not fall into

an exception it is conclusively unreliable." United States v. McKinney, 707 F.2d 381, 384 (9th Cir. 1983). The post-Ohio v. Roberts decisions of all the other circuits appear to utilize, in generally similar forms, the standard inquiry into (1) availability of the declarant and (2) factors indicating reliability of the declarant's statements. The Seventh Circuit does not apply, as claimed by Petitioner, a "crucial or devastating" test but rather examines the cases for general factors of reliability derived from Dutton v. Evans and Ohio v. Roberts. Flewallen v. Faulkner 677 F.2d 610 (7th Cir. 1982), cert. denied 103 S.Ct. 214.

Respondent would urge upon this Court that neither the Eleventh Circuit nor any other, save possibly the Ninth,

is misapplying the Court's directives on this issue. Surely, a proper interpretation by the Eleventh is not the occasion upon which to scrutinize the Ninth.

CONCLUSION

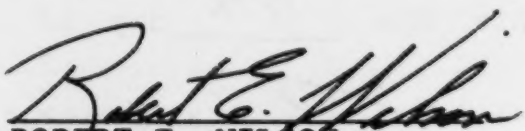
The declarant in the instant case was not only unavailable but was, in fact, completely unknown. The reliability of the hearsay evidence is to be inferred because it conforms to a well-established hearsay exception. Therefore, the "general approach" and analysis of Ohio v. Roberts, supra, support fully the conclusion of the Eleventh Circuit that the admission of the hearsay statements in the present case did not violate Petitioner's Sixth Amendment right to confrontation.

The statements also have particular-

ized guarantees of trustworthiness because they meet the criteria established in Dutton v. Evans, supra.

Therefore the admission of the statements into evidence did not violate Petitioner's Sixth Amendment right of confrontation. Respondent urges this Court to deny Petitioner's application for a writ of certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that I have this date served all parties with the foregoing Brief in Opposition to Petition for Certiorari by causing it to be placed in the United States mail, with the proper first class postage attached and addressed to:

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Robert Altman, Esq.
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This the 9th day of November, 1984.

Robert E. Wilson

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